

Countering Terrorism Across the Atlantic?

by Kimberley L. Thachuk

Overview

Differences in strategic vision and concepts of security are central to the U.S. and European Union (EU) approaches to counterterrorism. While the United States conceives of a *war* against terrorism, Europe does not. As a result of different perceptions of the threat, both sides of the Atlantic take divergent approaches to homeland security. Europeans tend to favor the use of a law enforcement strategy over a warfighting approach. Meanwhile, the U.S. administration believes that a quasi-militaristic, overtly proactive, and highly vigilant stance will serve as the best deterrent to future attacks. By their own standards, Europeans are doing more to counter terrorism since September 11 and even more since the attacks in Madrid (March 11, 2004) and in London (July 7, 2005); by U.S. standards, these measures sometimes appear inadequate. As a result, there are significant transatlantic divergences on the best methods for halting the spread of terrorism.

The way ahead in an EU–U.S. counterterrorism relationship may be to focus on positive areas such as capacity building, anti-corruption measures, and strengthening multilateral agreements. Further, the key to apprehending—or at least interrupting—terrorist conspiracies may well lie in cooperating on the law enforcement side to apprehend and incarcerate terrorists for criminal activity. The United States may have to be satisfied when terrorists are brought to justice for organized criminal activity in EU states. While this does not hold the same political weight as convictions for terrorism, the result may be fewer acts of terrorism. Perhaps the greatest task for the transatlantic counterterrorism partnership is to renew the sense of urgency for cooperation in areas where the United States and EU countries do agree.

Differing Assessments

American–European Union (EU) cooperation in the war against terrorism has improved in a number of important areas over the past several years, but in some respects policies and practices in justice and law enforcement continue to diverge. Overall, the effort is exposing serious differences born of the varying backgrounds and diagnoses of the problems. To be sure, both sides of the Atlantic are being more vigilant;

the United States and the European Union countries have worked diligently to create inhospitable environs for terrorists. Still, notable variations exist in their approaches to terrorism, especially with respect to the costs and benefits of responses to the heightened threat posed to the West. For the most part, the events of September 11 did not result in a fundamental shift of most European governments' security paradigm. However, both the Madrid bombings of March 11, 2004, and the London bombings of July 7, 2005, spurred new antiterrorist proposals that have since brought EU policy closer to that of the United States. Still, these measures have been undertaken not so much to cooperate with U.S. efforts as to address more realistically terrorism as "one of the key strategic threats facing Europe."¹ Indeed, shortly after the March 11 attack, British Prime Minister Tony Blair observed that the Madrid bombings had exacerbated the divergence between the United States and Europe.

In response to the September 11 attacks, Article V of the North Atlantic Treaty Organization (NATO) Charter was invoked for the first time in the history of the Alliance. Nevertheless, Europe does not see itself at war. For Europe, March 11 was a wake-up call that new policies and practices were needed, but it was not the beginning of a war in the same way that September 11 was for the United States. In general, Europeans have been dealing with relatively low-level terrorism for decades and have found means to cope with it. Many prominent Europeans have noted that complacency is a grave danger, particularly in light of the potential for terrorist groups to undertake mass terrorism using chemical, biological, radiological, and nuclear (CBRN) weapons. However, for the most part, European governments do not appear to share the United States sense of urgency about terrorist groups with global support networks.²

Under the auspices of NATO, European states agreed to numerous enhancements to defend against terrorism, such as intelligence-sharing and force protection measures. At the Prague Summit in November 2002, NATO members agreed to improved collaboration on

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civil emergency planning, increased sharing of information and intelligence, and intensified scientific cooperation, especially in the area of weapons of mass destruction (WMD). At the NATO Ministerial meeting in December 2004, members agreed to continue the measures adopted in 2002 as well as to improve interoperability and to conduct joint counterterrorism training exercises.

Despite these significant accomplishments in terms of collective security arrangements, the war in Iraq has muddied transatlantic counterterrorism relations. The Iraq war is very unpopular in Europe, and along with dredging up old transatlantic differences, it is viewed as exacerbating terrorism rather than combating it. European voters fear—and for them March 11 confirmed—that being seen as pro-American and, more importantly, supportive of the war in Iraq, makes them possible targets for al Qaeda and its affiliates.³

The transatlantic relationship on counterterrorism becomes still more difficult to decipher when the various approaches of the European countries are considered. While Britain has been a staunch ally of the United States, France has been less willing to enter into agreements in which privacy laws might be abrogated. Some of the other countries have less capacity to invest in anti-terrorist countermeasures due to fiscal constraints and lack of sufficiently robust institutions to confront adaptable transnational individuals and groups. Much of the transatlantic relationship continues to be conducted via bilateral channels rather than through the multilateral vehicle of the EU. However, for the purposes of analyzing the transatlantic counterterrorism relationship, sufficient similarities exist in European states' approaches such that some generalizations may be made about the stance they tend to take.

The war on terrorism has brought to the fore a number of latent differences between the United States and EU countries in the way that justice and law enforcement issues are approached and organized. By their own standards, Europeans are doing more to counter terrorism since September 11 and even more since the Madrid attacks of March 11, 2004; by U.S. standards, these measures sometimes appear inadequate. Regardless of these differences, the war on terrorism requires that all partners work together. It may be, therefore, that the United States will have to continue to urge European partners to take a stronger stance while at the same time make some serious and realistic choices over which issues it can bear to have less control.

A low point was reached in 2003–2004 when the United States and Britain were pitted against France and Germany in the debate over Iraq. Arguably, the past year has seen some warming of relations. President Bush's call for democracy in the Middle East and his fence-mending trip to Europe in late 2005 helped reduce tensions. Progress in the Middle East, including democratic elections in Afghanistan and Iraq, Syria's withdrawal from Lebanon, and steps toward democracy in Egypt and Saudi Arabia have further helped in creating a common cause across the Atlantic Alliance. NATO recently has increased its involvement in Afghanistan and is now training Iraqi security forces. All agree on the importance of creating a stable, democratic Iraq and on using diplomacy to deflect Iran from pursuing acquisition of nuclear weapons. Europeans are also working hard on creating the new NATO Response Force and on other defense initiatives. In this setting, perhaps collaboration can

be expanded elsewhere, including the key realm of counterterrorism. If so, determining exactly how to do so is critical.

Differences in Approach

Differences in strategic vision and the way that terrorism fits into overall concepts of security are central to the differences in the U.S. and EU approaches to counterterrorism. President Bush has defined the battle against terrorism as “a clash between civilization and those who would destroy it.”⁴ Indeed, the United States is waging a war against terrorism. Europe is not. While global terrorism has achieved somewhat greater political salience in Europe, particularly in the aftermath of the March 11 train bombing in Madrid, the security paradigm of European governments has not fundamentally shifted. As a result, there are significant transatlantic divergences on the best methods for halting the spread of terrorism.

For the United States, the strategy remains to: make no concessions to terrorists and bring them to justice for their crimes; broaden the international consensus that terrorism is an international scourge and warrants global cooperation; degrade, disrupt, and destroy terrorist cells and support networks using a combination of intelligence, law enforcement, financial, informational, and military capabilities; isolate any states

that harbor or support terrorism; enhance U.S. and coalition partner capabilities to counter terrorism and strengthen domestic critical infrastructures and consequence management capabilities to cope with a broad array of

terrorist attacks, including those from WMD; transform the environment in which terrorism flourishes by addressing the sources of anger and hatred; and minimize the backlash against coalition activities in the Muslim world.

Europeans, on the other hand, do not mix war and justice in their version of counterterrorist strategy. They tend to characterize terrorists as criminals and to favor a law-enforcement strategy over a warfighting approach. For Europeans, war requiring the annihilation of an enemy will do little to resolve criminal and social problems. Instead, law enforcement and judicial cooperation are required, as well as attention to conditions of poverty and deprivation that give rise to violent expressions of indignation and powerlessness.

Notwithstanding these beliefs, there remains, at times, a lack of consensus in Europe on whether it is possible to deter and protect against certain terrorist groups and some of their possible associates, as well as disagreement on which cases such action might be necessary. Despite the appointment in May 2004 of an EU Counterterrorism “czar,” responsible for coordinating the development of an EU-wide counterterrorism policy, most European governments assess and deal with terrorism “on an emergent basis, after particular threats have arisen.”⁵ Further, at the December 2002 NATO Parliamentary Assembly, European participants noted that they felt that the American response to terrorism has been “one dimensional” or solely a military one. While U.S. representatives quickly cited a three-pronged approach, involving military, political, and social components, the Europeans stressed that the latter two components are not evident. In effect, the Europeans were concerned that the United States was not adequately addressing the causes of terrorism.

A Perception Gap?

Since the September 11 attacks, Europeans have been apprehensive about some of the steps the United States has proposed and undertaken as part of the war on terrorism. Most European governments opposed a U.S. military campaign against the regime of Saddam Hussein for the purpose of eliminating WMD—even for the stated

Kimberley L. Thachuk is a Senior Research Fellow in the Center for Technology and National Security Policy at the National Defense University. Dr. Thachuk can be reached at thachukk@ndu.edu.

purpose of preventing those weapons from falling into the hands of apocalyptic terrorists. While Europeans and Americans agree that al Qaeda, and perhaps other radical Islamic groups, have the requisite determination and patience required to acquire and deploy WMD, they do not agree on the likelihood of their success in either instance.⁶

Europeans, for the most part, prefer to resolve differences with enemies through reconciliation and dialogue. A majority of Europeans view the unilateral move by the United States against Iraq, and the strong language employed against other would-be aggressors such as Iran and North Korea, as unhelpful and counterproductive. These Europeans are dedicated to multilateralism and resolution of crisis through international institutions. President Bush's announcement shortly after September 11 that "either you are with us or you are against us" was arguably viewed as damaging to the transatlantic relationship. While this remark was not necessarily intended to draw allies into a debate about the strength of allegiances, it was misinterpreted by many Europeans who were displeased by the proverbial line being drawn in the sand. Indeed, Europeans tend to feel that many of the Bush administration policies continue to reflect this stance. For Europeans, alliance does not imply allegiance in all things. They are further stung by the seemingly-recurrent implication, through U.S. action and deed, that this is a unipolar world in which the United States takes the lead. The European view is that the world is multipolar and that Europe is a significant, autonomous "pillar," effecting a balanced "partnership based on mutual respect" with the United States.⁷

As a result of different perceptions of the threat, both sides of the Atlantic take different approaches to homeland security. The United States believes that a quasi-militaristic, overtly proactive, and highly vigilant stance will serve as the best deterrent to future attacks. Europeans, while more conscious of the threat since the attacks on London and Madrid and more cooperative in terms of transatlantic collaboration in this regard, are still unwilling to replicate this stance with a "Fortress Europe." For some in Washington, this seemingly passive European attitude is making the United States increasingly vulnerable. After all, it is argued, the hijackers began plotting September 11 in Europe and then took advantage of good U.S.-European relations (that do not require visitor visas and so forth across the Atlantic), to enter the United States and execute their attack. Yet, the fact that the United States now openly displays the extent of the power and force behind homeland security should perhaps alert Europeans to the fact that terrorist groups, who might have originally set their sights on attacking the American heartland, may now be satisfied with targeting Europe.⁸

In terms of the NATO Alliance, the picture is somewhat different. At the Prague Summit in 2002, a majority of the Alliance concepts and doctrines were reviewed with the terrorist threat in mind. In particular, the Military Concept called for a common defense against terrorism, including the use of military force to deter, defend, disrupt, and protect against threatened or real terrorist attacks. It was further agreed that military assistance could be rendered to national authorities for dealing with the consequences of terrorist attacks, including those using CBRN weapons. The Military Concept further allows NATO to act outside the Euro-Atlantic arena wherever and whenever necessary, including involvement in crisis-response operations. What is interesting to note is that while there is a differing assessment of the threats posed by terrorism between the EU countries and the United States, the European members of NATO appear to support the Alliance's possible military action against terrorist threats. Reconciling these two seemingly different approaches will be an important task for both sides of the Atlantic.

Operational Differences

Differences of opinion continue between the United States and EU countries about the nuances of counterterrorism operations regarding, for example, the degree to which certain subnational communities should be monitored and how. As a result of September 11, the U.S. Justice Department utilizes a 1996 law that makes it a crime to offer "material support" to any group designated by the United States as a terrorist organization. Because this represents a once-removed evidentiary standard or a near-"guilt by association" notion of intent, it is seen as antithetical to stringent European evidentiary standards. Such differences do not bode well for cooperation that has existed at least since World War II on issues of legal harmonization, including information-sharing, mutual legal assistance, and extradition matters. Aside from political misgivings, many of the European states may be legally prohibited from sharing information or extraditing a suspect if such evidence or act will be contrary to the provisions set forth in their constitutions.

Despite these hurdles, since September 11, the EU Third Pillar Cooperation (police and judicial cooperation in criminal matters) and bilateral EU-U.S. exchanges in these areas have both been enhanced. The United States and the EU announced coordinated targeting of an expanded list of terrorists and terrorist entities at the May 2002 U.S.-EU Summit. Still, differences over the conduct of certain counterterrorism operations and the scope of information sharing are evident.

In June 2003, amid major debates over the war in Iraq, the United States and the EU succeeded in concluding two treaties, one paving the way for the extradition of terrorist suspects to America and the other offering mutual legal assistance for terrorism cases. Since the 2004 U.S.-EU Summit, both bilateral protocols have been implemented with 17 EU states. These treaties are landmarks because it is the first time a country has negotiated with the EU as a unit, and also because many EU states are opposed to extraditing their nationals for any crime, particularly if the death penalty is a sentencing option. In the first instance, the United States has long preferred to conclude bilateral extradition treaties with individual countries, so negotiating with the EU was viewed as a triumph for Europeans. In the second case, EU agreement

to form joint investigative teams, provide information on the assets of terrorist and criminal suspects, and allow videotaped testimony was a breakthrough for the United States, as these had previously been prevented by stringent EU civil liberties laws.

Indeed, while transatlantic collaboration on preventive security and investigative matters appears satisfactory, judicial issues could prove to be highly disruptive. Exceptional judicial provisions, such as irregular rendition, secret military courts, and the battlefield detainee status currently being employed by the United States, are problematic for Europeans on two counts. First, if not managed with a substantially multilateral approach, such exceptional legal measures risk being highly incompatible with existing European judicial principles, provisions, and practices. Second, because the fight against terrorism is also a fight for hearts and minds, Europeans fear that deviations from the rule of law and accepted international legal principles could play into the hands of terrorists. Europeans often argue that the Italian success against the Red Brigades was achieved with significant societal support due, in part, to scrupulous adherence to constitutionalism and high judicial standards.

A more recent sticking point has been the alleged extraordinary rendition program run by the Central Intelligence Agency (CIA), in which the agents are said to have spirited Egyptian-born imam

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Osama Mustafa Hassan, also known as Abu Omar, from the streets of Italy in 2003 without the approval of the Italian government and to have taken custody of two Egyptian terrorist suspects at the Stockholm airport and escorted them to Egypt to stand trial.⁹ In the former case, Italian authorities were clearly upset and claimed Omar had been kidnapped. In the latter case, widespread internal criticism forced the Swedish government to change its regulations for executing deportation orders. The Italian Government went so far as to issue 22 arrest warrants for the suspected CIA agents involved in the abduction of Omar, saying that it had hindered ongoing Italian terrorism investigations and sparked further Islamic extremism.¹⁰

Reports that the CIA maintained secret prisons in Europe and North Africa and used a number of EU states as transit facilities led to reactions by European governments ranging from quiet denial to seething outrage. Despite subsequent revelations that a number of European countries had allowed their facilities to “support the return of criminals/inadmissible aliens” and also by default to what many critics termed the eventual “outsourcing of torture,” the damage to transatlantic relations was done.¹¹

During her December 2005 trip to Europe, U.S. Secretary of State Condoleezza Rice restated the U.S. view that terrorists must be brought to justice wherever possible because traditional extradition is often not an option. She added that, “the local government can make the sovereign choice to cooperate in” the transfer of a suspect to a third country using rendition.¹² Rice’s implicit assertion was that circumventing traditional extradition allows for countries to cooperate with the United States while not undertaking unpopular overt judicial actions with political consequences. Rice underscored this point by stating that not only are European lives being saved by expediting burdensome legal procedures, but that the suspects in question are “essentially stateless, owing their allegiance to the extremist cause of transnational terrorism.” While politically expedient in the short run, this may not be the best argument for the United States to employ with European partners. European states take the European Convention on Human Rights very seriously and prefer to defer—even for responding to terrorism in extremis—to the European Court of Human Rights to safeguard the rights of individuals.¹³

Indeed, in his remarks to the press on the publication of a report of the inquiry into the irregular renditions by the Committee on Legal Affairs and Human Rights, Secretary General of the Council of Europe Terry Davis stated that while he strongly supports cooperation between Europe and the United States on all issues, especially in the fight against terrorism, “the threat of terrorism cannot justify disregard for the European Convention on Human Rights. Blatant violations of human rights, such as secret detention and torture, are not only morally wrong and illegal, they are dangerous because they undermine the long-term effectiveness of our fight against terrorism.”¹⁴

Differences in approach stem from how each side of the Atlantic defines terrorism and terrorists. Rather than being intimidated by the presence of 15 million Muslims, European states take their cues from their definitions of terrorism. For the most part, European states define terrorism as a crime, so they are legally constrained in the measures they can take. The majority of European national constitutions and the EU legal regime have clear guidelines for addressing criminal offenses. Thus, European countries impose a self-limiting definition on the amount and type of state force that may be brought to bear on terrorists.

For its part, the lack of success by the Bush administration in deciding whether the suspects at Guantanamo Bay prison are belligerents

or international criminals has led to strong recrimination from European states. On her January 2006 trip to Washington, German Chancellor Angela Merkel’s criticism of Guantanamo Bay was quickly rebuffed by President Bush on the grounds that the prison is “a necessary part of protecting the American people.”¹⁵ On the one hand, it is argued, if the suspects are belligerents, they must be accorded all the rights of the Geneva Convention Relative to the Treatment of Prisoners of War and become subjects of international humanitarian law.¹⁶ If, on the other hand, they are found to be international criminals, then *habeas corpus* would apply in most constitutional democracies, paving the way for fair and speedy trials of the detainees. It might be argued that by using the term *War on Terrorism*, the U.S. Government has opened the door for the detainees to be classified as belligerents under the Geneva Conventions.

Since the United States has chosen to call these suspects enemy combatants, this term, at some point in the future, may have a place in customary international law, thereby legitimizing the status. For this to occur, particular remedies, actions, and techniques must be decided upon and institutionalized such that they become practice, and therefore customary, over time.

The seemingly ad hoc nature of the terms and treatment of the detainees invites the accusation that arbitrary justice is being applied. The United States cannot operate alone on this front indefinitely; to successfully wage a global war on terrorism it must rely on the cooperation of friends and allies. To gain this cooperation, it must demonstrate that international law and institutions shape and constrain U.S. actions.

An Expanded Definition of Terrorism?

The focus of the current phase of the U.S. counterterrorism campaign has been on certain groups with global reach, failed states where terrorists can operate with impunity, and defiant state sponsors of terrorism. With this in mind, future transatlantic security planning needs to take into account not only the challenges of terrorism, but also a broader range of new asymmetric threats as they intersect with terrorism. Indeed, many of the tools required to counter other threats, such as international organized criminal activity, can be used to combat terrorism and a wide array of other transnational threats. Yet, because the global war on terrorism has consumed much American and European policy and planning time since September 11, some of the other transnational threats, such as drug trafficking, have seemingly fallen through the cracks.¹⁷ To focus on countering terrorism to the near exclusion of other threats is to overlook the fact that many, if not all of the threats, are linked. It is on this linkage that transatlantic consensus may be built.

The success of al Qaeda results not only from its adaptability but also its willingness to seek out the vulnerabilities of each state’s system and exploit them for criminal enterprise. In Europe, Spain was used by al Qaeda operatives to raise funds through a credit card scheme, while Germany was exploited for its privacy laws to store contraband materials. Funds were raised in Italy through the manufacture of counterfeit couture, and Belgium became the epicenter of document forgery using Belgian passports.¹⁸ Indeed, Belgium is particularly vulnerable because the Belgian police are rather ill-equipped to combat conspiracies of this nature, and because Belgium is the center of the international diamond business, which is an important source of funds and a money-laundering vehicle for terrorists. Britain is the target of Russian and Albanian mafias trafficking in humans that make upwards of \$1.6 million per week smuggling people into the country.¹⁹ The great fear is that because these trafficking rings are not concerned with whom

or what they are smuggling, but rather how much a client can pay, they may be helping al Qaeda and other groups to gain access to many European countries. Further, because of the Schengen Agreement²⁰ and despite the creation of the European Borders Agency to control the flow of illegal immigrants, once inside Europe, criminals can move across borders using a single visa, virtually undetected and unimpeded.

Both the United States and EU states are in agreement regarding the definition and illegality of most activities of organized crime. In fact, transatlantic legal, judicial, and law enforcement cooperation was strong prior to September 11, especially in terms of the fight against such organized criminal activity as human trafficking, arms smuggling, drug trafficking, international vehicle theft rings, hazardous waste dumping, and cross-border fraud schemes. Indeed, transatlantic law enforcement collaboration already had ironed out any barriers to concluding agreements on evidence sharing, cooperation in law enforcement intelligence gathering, rendition of fugitives, joint training, harmonized standards, port security, and financial regulation.²¹

Law Enforcement and Intelligence Cooperation

A key thrust of the U.S. counterterrorism strategy has included enhanced law enforcement exchanges and intensified cooperation with intelligence and security services worldwide. Much of this cooperation takes place through bilateral channels, including those with European governments. EU member governments responded quite vigorously to UNSC Resolution 1373 and subsequent measures that called on member states to take certain law enforcement and financial actions to thwart terrorism, including abolishing the use by terrorists of the Political Offense Exception to extradition. Further, there have been agreements on biometric standards, both bilaterally and via the International Civil Aviation Organization, as well as on cargo screening and inspection procedures under the Container Security Initiative. These measures, along with the implementation of the U.S.–EU Passenger Name Record agreement, which allows airlines to provide EU-origin passenger data for flights to the United States, have helped to integrate border control systems across the Atlantic.²²

While counterterrorism operations can be onerous, they will likely continue to be pursued via multiple bilateral channels largely because of the realities of the sovereign states system and the fact that corresponding law enforcement agencies generally have longstanding working relationships.

In December 2002, the United States and the EU assigned liaison points of contact between Europol and Eurojust and their U.S. counterparts; entered into agreement on the sharing between the United States and Europol of data on terrorism and crime; and collaborated on threat assessments. Among other things, the agreement allows the Federal Bureau of Investigation (FBI) and Europol to station officials in each other's headquarters. While not a Euro-FBI, Europol is acting with increasing efficiency as an information clearinghouse among European national police bodies on a widening range of matters. This model might offer some solutions for future U.S. law enforcement cooperation.

Cooperating closely, the European police have had considerable success piecing together the European links of the September 11 hijackers. In Germany, Moroccan Mounir el Motassadeq was convicted in 2003 for his role in the September 11 attacks. While the conviction was later overturned on appeal, the verdict was a victory for German prosecutors because it was the first successful prosecution of anyone involved in the September 11 attacks. Further, a number of European police and intelligence agencies claim to have prevented future planned attacks. In Spain, 300 people suspected of being involved in the March 11 bombing have been detained. The French police have arrested dozens of alleged terrorists and more recently have entered into a joint U.S.-France anti-terrorism center in Paris codenamed

"Alliance Base." With several countries, including Canada and Australia, contributing to it, the center allows sharing of intelligence information, including criminal records.

Meanwhile, although the British police had arrested suspects all over Britain, their dragnet had not delved deeply into fringe elements of the Islamic community for fear of violating civil rights. The London Underground bombings led Britain to appeal directly to the EU member states for "extra impetus" to understand the radicalization and recruitment behind these attacks, with Tony Blair stating that the links of terrorism are seldom confined to one country.²³ The Italian police thwarted an alleged attempt to gas the American Embassy in Rome in 2002 and apprehended a group of Moroccans near Venice with maps of the London Underground.²⁴ More recently, in April 2006, Italian police averted an attack by "North African Islamists" who were planning to disrupt the recent Italian elections by attacking a church in Bologna and the Milan underground.

A More Proactive European Approach?

Since the Madrid and London bombings, the European states have begun taking proactive stances in their approach to terrorism. This is perhaps borne of the realization that, while conspiracies are difficult to prove in the courts, waiting for a terrorist event to occur is not a palatable option. Recently, the Dutch government chose to test its new antiterrorist legislation, which enables the prosecutions of people who intend to commit terrorist acts. In March 2006, nine Muslims belonging to the so-called Hofstad terrorist group were found guilty of promoting a violent ideology. The ruling stated that, "threatening terrorist crimes strikes public order at its heart," which threatens Dutch democracy.²⁵

Perhaps the greatest victory in Europe was the conviction in Spain of Syrian-born Imad Eddin Barakat Yarkas, also known as Abu Dahdah, for conspiring with the September 11 hijackers. More significant were the guilty verdicts awarded to 17 of the 23 men who were on trial at the same time as Yarkas, not for any specific acts that they committed, but for their membership in, and support of, al Qaeda. In European courts, such charges are traditionally more difficult to prove because of strict adherence to rules of evidence and the difficulty of proving conspiracies. In part, these impediments were overcome because the Spanish Court chose to accept wire-tap evidence that may not be acceptable elsewhere in Europe. The decision also might be attributed to Chief Prosecutor Pedro Rubira's request of the Court to impose "an exemplary sentence that shows that fighting Islamic terrorism does not require wars or detention camps," alluding to the war in Iraq and the Guantanamo Bay prison.²⁶

Strengthening Current Efforts

Some positive measures on which the United States may work with European partners are in the areas of building capacity, curbing corruption, and strengthening multilateral agreements. The United States cannot combat small cells of transnational criminals and terrorists alone. Not only do the groups have little knowledge of each other's operations, they are autonomous operators who rely on their wits and guile to achieve success. Hence, the capture of one may not necessarily lead to the capture of, or information on, others. Modern terrorists are elusive denizens of a globalized world with no fixed addresses. They tend to move quickly across borders using fake passports and identification cards, gaining access to any number of countries before moving again, leaving few, if any, signs of their passing. They also operate in cyberspace using new technology to elude detection and evade capture. Criminals and terrorists are more adroit than many states at adapting to the realities of a globalizing world. Governments must not only catch up to the methods

being employed by such groups, they must surpass them by responding creatively, consistently, and quickly to the new challenges. To elicit the support needed, U.S. policymakers must take the first steps along the path of reconciliation with European partners. This may be done in the following manner:

Strengthening Multilateral Agreements

■ While bilateral agreements have useful applications, multilateral agreements tend to employ a group psychology to their adherence. A logical complement to effective mutual law enforcement assistance on a bilateral basis would be to conclude more multilateral treaties for cooperation between law enforcement and other agencies involved in pursuing terrorists. Such treaties are symbolically quite significant because they demonstrate that countries are not solely responsible for the activities of transnational actors within their sovereign borders.

■ European countries also could do more to ensure that non-profit organizations, such as charities, cannot be used to finance terrorism. Yet, many European leaders are hesitant about displeasing the minority groups in their countries and are walking a much finer line than are U.S. lawmakers in regard to monitoring and investigating individuals or nonprofit organizations. European nations tend to have much larger Muslim immigrant communities and hew to stringent standards regarding the inviolability of individual liberties and the treatment of minorities. With the recent exceptions of Spain and Holland, they disagree with the United States on the broad criminalization of indirect support for terrorist activities, especially with regard to what may be deemed legal and what might constitute an offense. Particularly contentious is the disagreement over what EU states view as funding for humanitarian organizations and the United States views as support for terrorist organizations in Palestine. The United States will have to respect these limitations and seek provisions in multilateral agreements that meet the standards of European countries.

Sharing Information

■ More effective information sharing requires greater numbers of analysts with expertise on the international financial system, as well as greater numbers of people in international law enforcement with fluency in foreign languages. The Europol Training and Education Program (TEP) addresses this factor by training Europol officers to operate in multicultural environments. The U.S. Government would make a wise investment by sending people to European capitals to gain working fluency in local languages and understanding and respect of local cultures. Communicating in the language of an ally is a sign of an intent to work multilaterally rather than unilaterally.

■ Policymakers face continued obstacles posed by poor or uneven sharing of information between national agencies. At the moment, serious institutional and cultural gaps exist in the dissemination of data and sources and the ability of each community to use the information to prevent, preempt, or deter terrorists. In addition, information produced by intelligence and law enforcement agencies needs to be put together in an effective and legally admissible way. Intelligence is rarely admissible in court, but its format could be modified so that it could be made more available to investigative bodies. Investigative evaluations could usefully complement intelligence ones. Europol, in its Counter Terrorism Program for example, addresses this point in its TEP, which trains law enforcement and intelligence officers to work together and

thus to be open to other institutional approaches. However, investment in intelligence capabilities in the Middle East and South Asia is somewhat lacking in numerous European states. The role of European intelligence in detecting the activities of terrorist financial operators in these regions would be invaluable, as many of the counterparts for the organizations are based in European countries such as Belgium.

■ In the United States, classified information cannot easily be shared with foreign nationals, which complicates prosecution and extradition proceedings. Increased sharing of intelligence presents the possibility of unauthorized disclosures to people who might harm U.S. interests and those of its allies. A concerted effort must be made to ensure that unclassified information can be safeguarded so that it may be shared with other countries. This has been a particular problem for European courts attempting to try terrorist suspects. At trial, courts have been forced to drop cases due to the unwillingness of U.S. authorities to share evidence. A case in point was that of Moroccan Mounir el Motassadeq,

who was convicted in 2003 for assisting the Hamburg-based September 11 suicide pilots. His conviction was overturned by a German appeals court in 2004 on the grounds that he was unfairly denied testimony from U.S.-held suspects, including Ramzi Binalshibh, who is believed to be the Hamburg cell connection to al Qaeda. Further, some Euro-

pean states have at times refused to block bank accounts because they claim that the United States is unwilling to share intelligence on many of the designated organizations and individual members.²⁷

Curbing Corruption in Third Party Countries

■ When collaborative efforts lead U.S. and EU partners to countries rife with corruption, some genuine understanding and attempt to address the problem must be made. Most governments appear willing to collaborate, share expertise and intelligence, conduct joint training, and work more closely with inter-governmental organizations. Yet, if their systems have been corrupted and their officials suborned, the information being shared is likely tainted, and their efforts can be only partly effective. Hence, working outside the coalition can be costly and fraught with the threat of receding cooperation. The value of intelligence from countries outside the coalition may require constant, rigorous scrutiny.²⁸

Accepting the Use of Criminal Justice Methods

The overarching goal of international counterterrorism efforts should be to stop terrorist attacks before they occur rather than to bring terrorists to justice for plotting terrorist conspiracies. The lessons learned by Europeans are important to note in this regard. The United States has dedicated significant monetary and human resources to hunting down terrorists and proving their conspiracies. Enormous political weight has been thrown behind the war on terrorism, and new tools, such as the U.S.A. PATRIOT Act, have been formulated to prosecute it. Meanwhile, Europeans have looked for ways to interdict terrorists before they can commit their acts.²⁹ While this sounds like a distinction without a difference, it is not. Europeans have dealt with terrorism for decades and have come to recognize the shadowy and elusive nature of these groups. They prefer to interdict the acts before they occur and have found that the political fallout is worse from a terrorist act occurring than it is from incarcerating known terrorists for criminal acts. As recently as January 2005, the European Commission

(EC) teamed up with the United Nations Office on Drugs and Crime (UNODC) to fight drug trafficking, organized crime, and terrorism. As UNODC Director Antonio Maria Costa observed, the joint commitment with the EC is a “clear recognition of the links between drugs, organized crime and terrorism, and our shared responsibility to combat this immediate, three-dimensional threat.”³⁰

Most terrorist cells have to raise their own operating funds now that state sponsorship has all but vanished, and many of their recent moneymaking activities are criminal in nature, since these readily generate quick cash. The heightened security tensions that resulted after September 11 have tended to obscure developments in the justice sector. Further, political considerations have led to heightened scrutiny and a rethinking of some practices and approaches, such as the sharing of intelligence, and whether these agreements truly meet U.S. national security needs and EU constitutional traditions. Yet, the areas of cooperation against organized crime are less contentious, and pursuing terrorists from the criminal justice angle may bring more success. Although proving a terrorist conspiracy can present a significant and often impossible evidentiary burden, proving criminal activity is not nearly as difficult. The key to apprehending, or at least interrupting, terrorist conspiracies as well as working in a close transatlantic partnership may well lie in cooperating on the law enforcement side to apprehend and incarcerate terrorists for criminal activity. The United States may have to be satisfied when terrorists are brought to justice for organized criminal activity in EU states. While this does not hold the same political weight as convictions for terrorism, the result may be fewer acts of terrorism.

Limitations, Obstacles, and Differences

Most Europeans are steadfast in their dedication to protecting human rights and see this as a matter of preserving their most basic values. They have made clear that, while they are fully committed to the fight against terrorism, they will not compromise on human rights to win that fight. In the words of the EU's Javier Solana, “There is absolutely no trade-off between security and human rights protection and the rule of law. The violation of human rights in the fight against terrorism is not only morally undesirable, but also ineffective in the long run.”³¹ The United States admittedly has confused international partners by not classifying prisoners at Guantanamo Bay as either belligerents or terrorists. Yet the potential for collaboration in this regard exists, as new international law often emerges from customary practices of states. Whether or not these prisoners might constitute a new form of international legal personality has largely gone undebated on both sides of the Atlantic.

Despite these seeming differences in perspectives, a landmark U.S.–EU extradition treaty was concluded. The main obstacle had been American use of the death penalty for certain capital crimes. By providing sufficient assurances that extradition will not lead to violations of European constitutional norms, the United States reached agreement with the EU on the terms of a treaty. While not explicitly taking the death penalty off the table, the United States conceded that the EU has the right to refuse extradition if the death penalty will be, or could be, imposed.³²

Other issues also stall the prospects of formulating better transatlantic relations. EU countries still smart over U.S. refusals to sign the Kyoto Treaty on Global Warming, to support the International Criminal Court, and to accept another term for Mohamed El Baradei as head of

the International Atomic Energy Agency. Further, the United States has continued to pressure Europe to list Hezbollah as a terrorist organization and impose sanctions. Led by France, Europe refuses to do so on the grounds that this step would impact future negotiations with Iran on the nuclear issue. France also argues that blacklisting Hezbollah will damage relations with other Middle Eastern countries, such as Lebanon, where the group not only engages in military operations, but is also a political party. Finally, Europeans watch with great skepticism the holding of the so-called illegal combatants in Guantanamo Bay. They cite the Geneva Conventions as well as international human rights law in urging the United States to uphold international law and either try these prisoners or set them free.

The Way Ahead

There is, of course, no way to suppress or interdict every conceivable terrorist movement or conspiracy, even when countries are cooperating fully. A more realistic scenario would be to increase dramatically the costs and risks that criminals and terrorists face when they seek to engage in conspiracies. Beyond that, more steps can be taken. The United States can work more with European partners to bolster states in transition and those new to democracy in any number of economic arenas. Indeed, the European model seems to offer incentives before punitive threats.

When the United States requests that European countries clamp down on terrorist groups, U.S. policymakers should anticipate that the successful interdiction of illegal transactions by law enforcement personnel will tend to drive terrorists and criminal groups further underground or toward more sophisticated methods of evasion. To the greatest extent possible, counterterrorism and organized crime operations must address entire networks rather than their component parts; partial quick fixes generate new problems that could become problems for Europeans exclusively. For example, if only some members of a terrorist network are apprehended and their assets forfeited, other operatives

will fill the void. By addressing the problem as one terminated when the effects are no longer felt in America, the United States risks angering Europeans, who may see themselves as being left behind with a problem that was only transferred to them. The United States cannot cease operations until the entire problem has been addressed satisfactorily for all partners.

Finally, attempting to impede terrorist financing only in the legitimate financial sector is insufficient.

It overlooks the fact that groups that have gone underground have resorted to alternative methods, such as the *hawalas*, for the movement and manipulation of finances.³³ Not only are movements through these systems virtually untraceable, but also many EU countries are reluctant to tamper with a system that allows remittances to be sent home to family members in the country of origin of many minority groups. As a result, cooperation between the United States and EU countries on this issue may be one of the most critical and difficult in countering terrorists and their financing.

Conclusion

As a result of differences over the war in Iraq, tensions between several EU states and the United States have been high. Despite this lapse in good relations, EU countries have undertaken many effective actions and initiatives in the war on terrorism. While many of the

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steps taken have been to secure European homelands and critical infrastructure, most have materialized as cooperative efforts with the United States. Many of the practices that the United States has put in place since September 11 already existed in European states that are all too familiar with terrorist activity.

There is little transatlantic disagreement that terrorism is a scourge and a threat to national and international security. There is also little doubt that EU states are working closely and collaboratively with U.S. counterparts. However, notable differences do exist in the way some of the justice components of the war on terrorism are being pursued. Standards on both sides of the Atlantic vary and are unlikely to converge on many of the legal issues, especially with regard to the monitoring of suspects, sufficient and compelling trial evidence, and sentencing guidelines. Perhaps the greatest task that lies ahead for the transatlantic partnership is to renew the sense of urgency for cooperation in areas where the United States and EU countries do agree, such as in the collection and sharing of intelligence. The fact remains that the United States will have to make some difficult choices in the interests of good relations with EU partners. It will have to decide between matters of vital importance and those on which it might be willing to concede so that, over the long term, EU states remain strong and cooperative partners in the war on terrorism.

Notes

¹ Javier Solana, "Terrorism in Europe: How Does the Union of 25 Respond to this Phenomenon?" Remarks by EU High Representative for the Common Foreign and Security Policy, Berlin, October 7, 2004, available at <http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/EN/discours/82163.pdf>.

² Observation by Dr. Stephen J. Flanagan, Director, Institute for National Strategic Studies, National Defense University.

³ Glenn Frankel, "Europe, U.S. Diverge on How to Fight Terrorism," *The Washington Post*, March 28, 2004, A15.

⁴ *National Strategy for Combating Terrorism* (Washington, DC: The White House, February 2003), 29. Available at <http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf>.

⁵ Jonathan Stevenson, "How Europe and America Defend Themselves," *Foreign Affairs*, vol. 82, issue 2 (March/April 2003), 75.

⁶ *The Transatlantic Dialogue on Terrorism: Initial Findings* (Washington, DC: Center for Strategic and International Studies, August 2004), available at <http://www.csis.org/media/csis/pubs/0408_transatlanticterrorism.pdf>, 6.

⁷ Roger Cohen, "A French Call for a New Day with U.S.," *International Herald Tribune*, January 10, 2005, 1.

⁸ Stevenson, 75.

⁹ Victor L. Simpson, "U.S. Allies Resist Secret Deportations," *USA Today*, June 19, 2005.

¹⁰ Gordon Corera, "CIA Renditions Strain Europe Goodwill," *BBC News*, March 20, 2006.

¹¹ Dick Marty, "Alleged Secret Detentions in Council of Europe Member States," Information Memorandum II, Committee on Legal Affairs and Human Rights, Council of Europe, January 22, 2006, available at <http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf>.

¹² Joel Brinkley, "U.S. Interrogations are Saving European Lives, Rice Says," *The New York Times*, December 6, 2005.

¹³ See Colin Warbrick, "The European Response to Terrorism in an Age of Human Rights," *The European Journal of International Law*, vol. 15, no. 5 (2004), 989-1018.

¹⁴ Speaking Notes of the Secretary General on Council of Europe Report on Article 52 Investigation Committee on Legal Affairs and Human Rights, Council of Europe, March 1, 2006, available at <http://www.coe.int/T/E/Com/Files/Events/2006-cia/Speaking_notes%20_sg.asp>.

¹⁵ "Bush Rebuffs Merkel on Guantanamo," *BBC News*, January 13, 2006, available at <<http://news.bbc.co.uk/2/hi/europe/4610872.stm>>.

¹⁶ Geneva Convention Relative to the Treatment of Prisoners of War (Geneva, Switzerland: 12 August 1949), available at <<http://www.unhcr.ch/html/menu3/b/91.htm>>.

¹⁷ Kimberley Thachuk, "Transnational Threats: Falling Through the Cracks?" *Journal of Low Intensity Conflict and Law Enforcement*, vol. 10, no. 1 (Spring 2003), 47-67.

¹⁸ Christopher Boucek, "Belgium: the Epicentre of Terrorism in Europe," *Jane's Terrorism & Security Monitor*, March 12, 2002. Service subscription.

¹⁹ Gary Mason, "Immigration Criminals May Aid Terrorists," *Jane's Intelligence Review*, December 1, 2002. Service subscription.

²⁰ The Schengen Agreement, which is part of EU law, introduces a common visa policy by removing all internal border controls and implementing effective controls at the external borders of the EU. For more details, see <http://europa.eu/abc/travel/doc/index_en.htm>.

²¹ Jonathan M. Winer, "Cops across Borders: The Evolution of Transatlantic Law Enforcement and Judicial Co-operation," Council on Foreign Relations, September 1, 2004, available at <http://www.cfr.org/publication/7389/cops_across_borders.html>, 2.

²² On May 30, 2006, however, the European Court of Justice overturned an agreement that provides the United States personal data from air passengers traveling to the United States from Europe. Current procedures remain in effect for the next 4 months—the deadline set for the European Commission and the U.S. Government to negotiate a new agreement. For more details, see Nicola Clark, "EU Court Bars Giving Passenger Data to U.S.," *International Herald Tribune*, May 31, 2006.

²³ "EU Agrees New Security Measures," *BBC News*, July 14, 2005.

²⁴ The majority of the more than 200 suspects arrested in Europe since September 11 have been North African rather than Middle Eastern. European intelligence sources believe that al Qaeda, having been disrupted, is attempting to recruit long-established Islamic terror groups from countries such as Morocco, Tunisia, and Algeria.

²⁵ "Dutch Jail 'Terror Group' Muslims," *BBC News*, March 10, 2006.

²⁶ Renwick McLean, "Spain Finds Qaeda Cell Chief Guilty in 9/11 Plot," *International Herald Tribune*, September 27, 2005, 1.

²⁷ For example, the Luxembourg government stated recently that the country's banking regulatory agency "did not have access to releasable intelligence information" related to the case against al Barakaat and thus released the assets of an organization allegedly linked to the *hawala*. European governments have faced legal challenges from citizens on the United Nations terrorist list of 219 people who are suspected members or supporters of al Qaeda. These people claim that they have been denied their right to trial which is enshrined in the Council of Europe Human Rights Charter, available at <http://www.europarl.eu.int/charter/default_en.htm>.

²⁸ For example, in Cyprus, an aspirant to the EU, questions remain about the nature of certain members of the Greek Cypriot leadership and their ability to regulate international companies according to EU best practices for money laundering. Greek Cypriot President Papadopoulos' law firm has recently been accused of providing front companies to launder Slobodan Milosevic's arms trafficking profits. For more details, see Kerin Hope, "Greek Cypriot leader's law firm linked to funding web for Milosevic," *Financial Times*, April 15, 2003, 14.

²⁹ Speech by member of the Guardia Civil, April 1, 2003, Garmisch, Germany.

³⁰ "UN Teams Up with European Commission to Fight Drug Trafficking, Crime and Terror," January 21, 2005, available at <<http://www.europaworld.org/week208/unteams21105.htm>>.

³¹ Solana.

³² General Secretariat of the Council of the European Union, *European Union Factsheet: Extradition and Mutual Legal Assistance* (Brussels: June 2003), available at <http://ec.europa.eu/comm/external_relations/us/sum06_03/extra.pdf>.

³³ *Hawalas* are informal money exchange networks that have existed for centuries. They are based on trust and no money physically moves across international borders in a normal transaction.

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Center for Technology and National Security Policy

Hans Binnendijk
Director